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No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1969

RICHARD WAYNE HART, LARRY LYNN HART and ALLEN RAY LEONARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1451

RICHARD WAYNE HART, LARRY LYNN HART and ALLEN RAY LEONARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINION BELOW

The opinion of the court of appeals (Pet. App. D) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1969. The petition for a writ of certiorari was filed on May 28, 1969, and is therefore

out of time under Rule 22-2 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court should have sustained petitioners' motions to suppress all evidence and to dismiss the federal indictment on the ground that local police mistreated petitioners after their arrest.

2. Whether the evidence sustained petitioners' conviction of entering a federally insured bank with intent to commit larceny.

3. Whether an instruction relative to an asserted lesser-included misdemeanor offense should have been given by the trial court.

STATUTE INVOLVED

18 U.S.C. 2113(a) provides as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such sav-

ings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined no more than $5,000 or imprisoned not more than twenty years, or both.

Petitioners claim as relevant subsection (b) of said section, which reads as follows:

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined no more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisonment not more than one year, or both.

STATEMENT

After a trial by jury in the United States District Court for the Western District of Oklahoma, petitioners were convicted of entering a federally insured bank with intent to commit a felony affecting said bank, *i.e.*, larceny of money and property, in violation of 18 U.S.C. 2113(a). Each petitioner was sentenced to imprisonment for a period of ten years (2 R. 1, 10-15; Pet. App. A). The court of appeals affirmed.

Before trial, each petitioner filed a motion to suppress and dismiss. Each motion alleged that, following threats and violence by local law-enforcement officers surrounding the building occupied by petitioners, each surrendered; that the officers, without cause or provocation, inflicted cruel and unusual punishment by kicking and beating them; that this action tainted the entire investigation; and that the only remedy was suppression of all evidence and dismissal of the indictment (2 R. 4-8). On hearing of the motions, petitioners Richard Hart and Leonard testified that on October 30, 1967, they were inside a bank in Warr Acres, Oklahoma. They heard gunshots outside the building and officers ordered them outside with their hands raised. They crawled back up through "the hole" and the officers kicked them off the top of the building. After they were on the ground with their hands handcuffed behind their backs, according to their testimony, they were kicked and stomped on and Hart was hit in the back of the head with the butt of a shotgun (1-A R. 4-10, 13, 15-17).[1] Government objections were made that this testimony was irrelevant to any issue in the case. The court inquired of petitioners' counsel whether any confessions or incriminating statements were made. He replied that the motions were not directed to matters such as that. The motions were overruled, the court holding that the official misconduct alleged would not exonerate petitioners of the

[1] The record is in three volumes. Volume 1-A is at the back of Volume 1 and is separately paginated from the rest of the volume. It contains the transcript of the pre-trial hearing.

offense, but might provide a basis for a civil action against the officers (1-A R. 10, 13, 14, 24; 2 R. 9-10). Similar motions were made and overruled at various times during the trial, it being stipulated that the evidence on behalf of petitioners would be the same as that adduced at the pretrial hearing (1 R. 5-7, 8, 22-23).

The evidence as to the offense showed that on the night in question city and county officers were observing the bank premises. They saw petitioners drive past several times, park their car and climb to the second floor with a number of tools. Later, one shot was fired by an officer. Richard Hart came to the window with his hands up. The officers ordered petitioners to come back through the hole they had made in the roof, and petitioners complied. They were ordered to get off the roof and they climbed down to the ground (1 R. 12, 23-26, 28-31, 60-65). A number of tools, a revolver and acetylene torches were found inside the bank. A hole had been burned in the door to the safe and the handle removed. There were no other persons in the bank building (1 R. 10-12, 14, 31, 35, 77).

ARGUMENT

1. There was no occasion for the government to introduce evidence on the issue of the alleged use of excessive force in connection with the arrest of petitioners by local officers. The trial court correctly held that this was irrelevant, in the absence of an effort by the government to use evidence gained

thereby, and, as the court of appeals noted, "[n]o confessions were obtained and no other evidence elicited from the accused as a result of this treatment" (Pet. App. xvi). See, *e.g.*, *Weeks* v. *United States*, 232 U.S. 383; *Mapp* v. *Ohio*, 367 U.S. 643; *Gilliam* v. *United States*, 323 F.2d 615 (C.A.D.C.), certiorari denied, 375 U.S. 850; *D'Angiolillo* v. *United States*, 340 F.2d 453 (C.A. 2), certiorari denied, 380 U.S. 955. All the evidence of the federal crime existed independently of the alleged misconduct by local officers. As the court below stated, "There is nothing to indicate that federal officers in any way participated in or condoned the alleged brutality" (Pet. App. xvi). That court further pointed out, "There is no nexus between the allegedly wrongful treatment and the prosecution for the federal offenses charged" *(ibid.)*. Assuming the substantiality of petitioners' claim, they would have a right of action against the officers in both the federal and state courts. 42 U.S.C. 1983; *Monroe* v. *Pape*, 365 U.S. 167; *Anneler* v. *State*, 93 Okla. Cr. 437, 229 P.2d 238. But they were not entitled to the suppression of testimony and the dismissal of the indictments in the federal prosecution.

2. Petitioners' convictions were amply sustained by the evidence. 18 U.S.C. 2113(a), under which petitioners were charged, makes it an offense to enter a bank with intent to commit any felony or larceny, regardless of the amount involved. *Prince* v. *United States*, 352 U.S. 322, 328; *Pinkney* v. *United States*, 380 F.2d 882, 885 (C.A. 5) certiorari denied, 390 U.S. 908. Petitioners received more than their due

in an instruction that the jury should convict only if they found an intent to steal property valued at more than $100 (1 R. 115-116). Even under the instruction given, however, an intent to steal more than $100 could plainly be inferred by the jury from the elaborate nature of the preparations and the risks assumed by petitioners to accomplish their obvious purpose.

3. Finally, the trial court did not err in refusing to frame an instruction about a "lesser included offense" of intending to steal an amount less than $100 (1 R. 109-110, 121). No such offense exists under the statute pursuant to which petitioners were charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JUNE 1969.

END